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SOME COMPARATIVE ASPECTS OF THE EUROPEAN UNIFICATION OF THE LAW OF PRODUCTS LIABILITY

Werner Lorenz†

Looking at the law of torts as it has been developed by courts and scholars in the United States, a civil lawyer is not merely impressed by the large number of decided cases, but is also fascinated by the variety of solutions offered to many important problems. This is particularly true in the area of products liability. Even though its ramifications with respect to the law of contract are obvious, over several decades it has become a distinct branch of the law of torts. Because "the assault upon the citadel of privity,"¹ of which Cardozo spoke in 1931, has been successful, it seems appropriate to deal with products liability primarily from the perspective of extra-contractual responsibility. The need for such an approach is supported by the fact that defective products may cause damage not merely to the ultimate buyer and persons who belong to his family or household or who are guests in his home,² but may also injure innocent bystanders to whom no lawyer's ingenuity can extend a contractual relation with a previous seller of the product. Although the products liability section of the *Restatement (Second) of Torts*³ is no longer phrased in terms of "warranty," recovery under the new section is limited to ultimate users or consumers. The draftsmen added that they did not want to express an opinion as to whether the new rules of strict liability might also be applied to persons other than users or consumers.⁴ This somewhat hesitant attitude shows that the *Restatement* has not yet completely departed from the theory of warranty. Once it is realized that sound legal policy requires protection of the public at large against damage resulting from defective products, the remedies of tort law should be available not merely to passengers in defective automobiles but likewise to pedestrians hit by such vehicles. It appears that the American case law has developed in this direc-

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¹ *Ultramares Corp. v. Touche*, 255 N.Y. 170, 180, 174 N.E. 441, 445 (1931).

² See UNIFORM COMMERCIAL CODE § 2-318, alternative A (1972).

³ RESTATEMENT (SECOND) OF TORTS § 402A (1964).

⁴ *Id.*, Explanatory Notes § 402A, caveat (1) at 348. It should be noted, however, that "user" is also meant to include persons "who are passively enjoying the benefit of a product." See *id.*, Explanatory Notes § 402A, comment *l* at 354.

tion.⁵ This is to be welcomed, because bystanders normally have little opportunity to search for defects.

Compared with this advanced state of the American extra-contractual law of products liability, European law lags behind. Courts and legislators in some countries, however, have become increasingly aware of the social impact of this problem. Since it is not the purpose of this paper to survey recent developments of this branch of law in the major European legal systems, no attempt will be made to review the various solutions sought by national courts, legislators, and scholars with which an eminent American comparatist like Professor Schlesinger is doubtless well acquainted. In my opinion, the steps which are now being taken to unify the law of products liability on a European level deserve more attention than solutions envisaged within the framework of any particular national legal system. Progress is possible on several fronts. The Hague Conference on Private International Law, for example, has attempted to unify the conflicting rules applicable to products liability cases containing a foreign element. As a result of this work, the Twelfth Session of the Hague Conference (October 1972) approved a Convention on the Law Applicable to Products Liability.⁶ The advantages to be gained from uniform conflict rules need not be explained to an American lawyer whose daily bread consists of solving the most difficult interstate conflict cases. However, it goes without saying that unification of substantive law is superior to mere unification of rules determining the applicable law.

Two European organizations are presently engaged in bringing about the desired uniformity of the law of products liability: (1) The Council of Europe (Strasbourg) has set up a Committee of Experts, which held its first meeting in November 1972.⁷ Since

⁵ W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 100, at 663 (4th ed. 1971). See, e.g., *Wasik v. Borg*, 423 F.2d 44 (2d Cir. 1970); *Sills v. Massey-Ferguson, Inc.*, 296 F. Supp. 776 (N.D. Ind. 1969); *Caruth v. Mariani*, 11 Ariz. App. 188, 463 P.2d 83 (1970); *Elmore v. American Motors Corp.*, 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969); *Darryl v. Ford Motor Co.*, 440 S.W.2d 630 (Tex. 1969).

⁶ See Conférence de La Haye de droit international privé, Actes et documents de la Douzième session 2 au 21 octobre 1972, Tome III, Responsabilité du fait des produits, Acte final 246-50 (1974); see also Lorenz, *Der Haager Konventionsentwurf über das auf die Produkthaftungspflicht anwendbare Recht*, 37 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT [RABELSZ] 317 (1973).

⁷ The present writer participated in these meetings as head of the delegation of the Federal Republic of Germany. According to the Statute of the Council of Europe (signed in London on May 5, 1949), it is the aim of the Council "to achieve a greater unity between its Members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress." Article 1 of the Statute from which this citation is taken further provides that "[t]his aim shall be pursued

then the Committee of Experts has met several times a year, and the work on a European Convention Relating to the Law of Products Liability has now reached its final stage. The draft of the Convention, together with an explanatory report, will soon be submitted to the European Committee of Legal Cooperation (CCJ)⁸ for final consideration. If accepted, the draft will be opened for signature and ratification by the Member States of the Council of Europe. (2) Independent of the Council of Europe, the European Economic Community (EEC), as early as 1968, made its first plans to examine the subject of products liability. However, due to the negotiations with the United Kingdom in 1971, these plans had to be postponed. The idea of harmonizing the law of products liability among Member States of the European Community was later given a fresh impulse by the final declaration of the Paris Summit Meeting of the Heads of Government of the nine Member States, held in December 1972. Item No. 6 of this Declaration demands formulation of a better consumer protection program, and it was tacitly understood that products liability should be one of its major aspects.⁹ The differing legal positions in the various member states of consumers who have suffered damage directly affects the operation of the Common Market¹⁰ in three ways. It means that consumer protection not only varies considerably as between Member States, but also remains inadequate. In view of

through the organs of the Council by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms." At present the Council of Europe has 18 Member States. For more details, see A. H. ROBERTSON, *EUROPEAN INSTITUTIONS* 33 (2d ed. 1966). The full text of the Statute of the Council of Europe is reprinted in Appendix I, at p. 272.

The Committee of Experts was established pursuant to a resolution adopted by the Committee of Ministers acting on a proposal of the European Committee of Legal Cooperation. The decision was taken by the Committee of Ministers at the 192nd meeting of the Deputies; see CM/Del/Concl. (70) 192, item VI. Valuable preparatory work was done by UNIDROIT—the Institute for the International Unification of Private Law in Rome—which submitted a report stating the law governing the liability of producers—both in contract and in tort—of the Council of Europe's Member States, the United States, Canada, and Japan; see Document EXP/Resp. Prod. (71) 1, vols. I, II, & III. See also Secretary General of UNIDROIT, *Third Report on the results and prospects of cooperation between the Council of Europe and the International Institute for the Unification of Private Law (UNIDROIT)*, Eur. Consult. Ass., 24th Sess., Doc. No. 3145, 3 Docs 3 (1972).

⁸ See note 7 *supra*.

⁹ Declaration of Paris Summit meeting, item #6. For the full text of the Declaration of Heads of State or Government of the enlarged Community, see XX *ANNUAIRE EUROPÉEN/EUROPEAN YEARBOOK* 473 (1974).

¹⁰ See Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 100, 298 U.N.T.S. 5, 54; A. CAMPBELL, *COMMON MARKET LAW, TEXTS AND COMMENTARIES* § 1224 (1962).

the different costs borne by industries in the various Member States, competition is distorted and free movement of goods within the Common Market is impeded. For these reasons, the Commission of the European Community has decided to issue a directive which takes into account the differences between the laws of the Member States. This directive will establish rules to protect the interests of consumers, remove distortions of competition within the Community, and dismantle obstacles to the free movement of goods.

Since actual work on the proposed directive began only a few months ago, it is still too early to enter into a discussion of this project.¹¹ The directive to be developed in Brussels will certainly benefit from the previous discussions of the subject at Strasbourg because the Member States of the European Community were all represented in the Committee of Experts of the Council of Europe. But it is obvious that a directive is in many respects different from a convention of the type prepared by the Council of Europe. In the present context this needs no explanation. Nevertheless, the situation for those countries which are Member States of both organizations has been complicated by the fact that the same subject has been approached almost simultaneously on different European levels.

I

SCOPE OF CONSUMER RECOVERY

The European Draft Convention on Products Liability must be viewed against the background of a case law development in the majority of Member States extending the liability of producers. New production techniques as well as marketing and sales methods have increased the need to protect consumers. Thus, in the words of the preamble, it is the aim of the Convention "to ensure better protection of the public." The legitimate interests of producers, however, are also to be taken into account. We shall discover the extent to which this Convention has really succeeded in achieving a

¹¹ There is a "first preliminary draft directive concerning the approximation of the laws of Member States relating to product liability" dated August 1974; *see* Working Document No. 2 to the attention of the working group "product liability," XI/334/74. This draft was discussed at the first meeting of the group held in Brussels from Jan. 7 to Jan. 9, 1975. The present writer, together with Professor André Tunc from the Université de Paris 1, has been invited by the Commission of the European Community to act as an expert of the Commission.

fair balance between the various interests involved in products liability cases.

Before delving into the details of any substantive proposals, the Strasbourg Committee of Experts made several important decisions setting the scope of the Convention. The first question considered was whether contractual as well as non-contractual liability should be included. The Committee soon realized that any attempt to unify the national rules governing contractual liability would raise virtually insuperable problems. This was evidenced by the history of the Hague Conventions of 1964 on the Unification of Law governing the International Sale of Goods.¹² These were the outcome of decades of painstaking work by distinguished comparative lawyers from several European countries. In this context, it may perhaps suffice to remind the reader of Ernst Rabel, whose famous comparative study on *Das Recht des Warenkaufs* provided the indispensable preliminary research for this project.¹³ Moreover, the classical remedies of sales law dealing with warranties against defects of quality are mainly concerned with rescission of the contract, reduction of the price, and recovery of commercial loss. These remedies are not the hard core of products-liability recovery as found in cases of personal injury or physical property damage caused by defective products that the manufacturer has put into the stream of commerce. It has already been pointed out that with respect to these types of damage the "innocent bystander" is just as worthy of protection as the ultimate buyer or consumer of the product.¹⁴ This militated in favor of a system of liability without reference to the existence of a contract between the person liable and the person suffering damage.¹⁵ The Convention there-

¹² As a result of these Conventions there are now two uniform laws: (1) The Uniform Law on the International Sale of Goods, and (2) the Uniform Law on the Formation of Contracts for the International Sale of Goods. The following States have ratified these Conventions: Belgium, Federal Republic of Germany, Italy, Israel, The Netherlands, San Marino, and the United Kingdom.

¹³ See E. RABEL, *DAS RECHT DES WARENKAUFS* (1957).

¹⁴ See notes 2-5 and accompanying text *supra*.

¹⁵ It should be noted that even the Hague Convention on the Law Applicable to Products Liability (see note 6 *supra*) excludes the whole sphere of contracts from the field of application. Art. I par. 2 states that "[w]here the property in, or the right to use, the product was transferred to the person suffering damage by the person claimed to be liable, the Convention shall not apply to their liability *inter se*." This means that different laws may be applied to the contract action and to the tort action if a legal system permits concurring actions in contract and in tort. A proposal by the delegation of the Federal Republic of Germany aimed at solving this difficulty was rejected; see *Conférence de La Haye de droit international privé, Actes et documents de la Douzième session 2 au 21 octobre 1972, Tome III, Responsabilité du fait des produits, Document de travail No. 22, at 151 (1974); Lorenz, supra note 6, at 152-53.*

fore rejects any discriminatory treatment as between the consumer who has purchased a product and other persons suffering damage due to its defective condition.

Originally, it had been the intention of the Committee of Experts to deal with a producer's liability not only for death or personal injury, but also for damage caused to property. In view of the slow progress made in other basic matters of the Convention, however, this idea had to be abandoned. Moreover, doubts were raised as to whether the same principles of liability should apply to both types of damage, and it was feared that some states might not consider ratification if property damage were included. A preliminary draft that attempted to deal with damage caused to property revealed the inherent difficulties. Had they been adopted with the exception that some delegations insisted upon, little would have remained to these provisions. Thus, it was suggested to exclude from the Convention: (1) damage caused to the product itself; (2) damage caused to property because the product did not fulfill the purpose for which it was destined; (3) damage caused to a finished product by a component part; and (4) economic loss resulting from damage referred to in (1), (2), and (3). Most of these exceptions are based upon the idea that in these situations recovery is better left to the law of contracts. There was also a strong tendency to leave to the law of each signatory state such matters as the limitation on the amount of compensation and the permissibility of clauses exculpating a producer's liability. For these reasons the present Draft Convention is limited to compensation for death or personal injury, and the CCJ will have to decide whether or not an additional protocol on products liability with respect to property damage is to be developed.¹⁶

The Committee of Experts also had to decide whether the fault-based theory of liability should be replaced by strict liability. Among the countries represented in the Council of Europe, only France had a system of producer's liability which, in its practical

¹⁶ The *Restatement (Second) of Torts* § 402A also protects against "physical harm" in the form of damage to the user's land or chattels. The doctrine of strict liability in tort, however, does not permit the recovery of pure economic loss. See *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965) (Traynor, C.J.); but see also the dissenting opinion of Justice Peters in *Seely*. The contrary view was also maintained by the Supreme Court of New Jersey in the case of *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965). But recovery of commercial loss was denied in *State v. Campbell*, 442 P.2d 215 (Ore. 1968) and *Price v. Gatlin*, 405 P.2d 502 (Ore. 1965). For a discussion of this problem see Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases*, 18 STAN. L. REV. 974 (1966) and Note, *The Expanding Scope of Enterprise Liability*, 69 COLUM. L. REV. 1084, 1101 (1969).

effect, is not based on fault. Both the *fabricant* and the *vendeur professionnel* are held liable for damages under a theory of *garantie* derived from Article 1645 of the Code Civile.¹⁷ A manufacturer or seller who is engaged in the business of selling the product which has caused the damage is thus deemed to have known the *vice de la chose*.¹⁸ Although this action sounds in contract, the procedural device of *appel en garantie* enables the last buyer to get a judgment against the manufacturer with whom he was not in a contractual relationship. In a system like this the practical importance of the classical delictual remedies under Arts. 1382, 1383 of the Code Civile, which are based upon the notion of fault, is greatly reduced.¹⁹

In other countries, such as the Federal Republic of Germany, the tort action based upon a provision of the Civil Code²⁰ is still the main remedy available to an injured consumer who has no direct contractual link with the manufacturer. However, the German Federal Supreme Court (BGH) achieved a major breakthrough in the field of products liability by shifting the burden of proof. It was held that

if somebody uses an industrial product in accordance with its expected use and suffers damage with respect to one of the rights specified in § 823 par. 1, because the goods had been produced defectively, then it is for the manufacturer to elucidate the events which caused the defect in the goods and to prove that they did not involve any fault on his part.²¹

The court was of the opinion that it was not entitled to introduce a system of strict liability, that this was a decision reserved for the legislature. Theoretically, therefore, the basis of products liability in Germany is still fault on the part of the manufacturer. Nevertheless, this new system of reversed burden of proof comes very close

¹⁷ Code Civile [C. Civ.] art. 1645 (73e ed. Petits Codes Dalloz 1973-74).

¹⁸ For details see Mazeaud, *La responsabilité civile du vendeur-fabricant*, 53 REV. TRIM. DR. CIV. 611 (1955); see also Malinvaud, *La responsabilité civile du vendeur à raison des vices de la chose*, [1968] La Semaine Juridique [J.C.P.] I. 2153. The leading French case is the famous decision of the Cour de Cassation in the "affaire du 'pain maudit' de Pont-Saint-Esprit": Cass. Civ. 19 Jan. 1965, [1965] Recueil Dalloz-Sirey [D.S. Jur.] 389 = Gazette du Palais [Gaz. Pal.] 1965.1.359.

¹⁹ C. Civ. arts. 1382-8 (73e ed. Petits Codes Dalloz 1973-74).

²⁰ Bürgerliches Gesetzbuch [BGB] § 823 par. 1 (Beck 1974).

²¹ See Judgment of Nov. 26, 1968, 51 Entscheidungen des Bundesgerichtshofs in Zivilsachen [BGHZ] 91, 102. For a detailed comparative discussion of this case, see Lorenz, *Einige rechtsvergleichende Bemerkungen zum gegenwärtigen Stand der Produkthaftpflicht im deutschen Recht*, 34 RABELSZ 14 (1970). The case is also discussed by Mankiewicz, *Products Liability—A Judicial Breakthrough in West Germany*, 19 INT'L & COMP. L.Q. 99 (1970).

to strict liability. It appears that a manufacturer will rarely be able to convince a court that no negligence was involved when a defective product was put into circulation. Indeed, since this leading decision there has arisen no known case in which the action was dismissed on the ground that the manufacturer had exonerated himself. It should be pointed out, however, that under this system of products liability there are at least two types of cases in which recovery must be denied: (1) There may be situations in which the manufacturing process and the quality control are fully mechanized. Thus, it may be difficult to find a human being who could possibly have been negligent, because it was a machine which had failed. (2) The manufacturer may still prove that the damage was unforeseeable and unavoidable in the state of scientific knowledge at the time the product was put into circulation, and that the defect could not have been known when the damage occurred ("development risk").²²

Even with the reversal of the burden of proof, the Committee of Experts decided that the notion of fault no longer constituted a workable basis for products liability theory in an era in which modern technology had created unacceptable risks for the consumer. In the opinion of the majority, a system which merely reversed the burden of proof would not represent an appreciable improvement of the current situation in those countries where fault was still the basis of liability. It was even feared that claimants might still be embroiled in disputes concerning the internal operation of the manufacturer's firm. These fears appear to be exaggerated; they are certainly not borne out by the case law as it has been developed in Germany under the new rule described above. Be that as it may, there can be no doubt that this decision was also influenced by the development of the American case law of products liability, which for some time has been based upon similar considerations. The discussions at Strasbourg were permeated with the idea that the European public was demanding a spectacular change, and that this demand, as one delegate remarked during the discussions, could only be satisfied by doing something "revolutionary."

After this decision in favor of liability without fault had been made, the question arose as to how "strict" or "absolute" this liability should be. The *Restatement (Second) of Torts*, again a valuable

²² Whether the Thalidomide case (in Germany: Contergan) may be brought under this category remains uncertain. In Germany, the case was settled out of court, that is, a fund of DM 150 millions was established in order to compensate the victims.

source of inspiration, speaks of products "in a defective condition unreasonably dangerous to the user."²³ "Defect" is thus defined in terms of "danger," *i.e.*, exposure to risk. The draftsmen of the Restatement have explained this notion of "defect" in their comment: if a product "is safe for normal handling and consumption" it is not to be considered defective.²⁴ But in view of the fact that it is impossible to make all products entirely safe for all consumption or use, they are regarded as defective only if the risk involved is "unreasonable." This gives a court some discretion, and it is here that a duty arises to warn against known risks. The criterion of "reasonableness" therefore provides an important guideline for dealing with unavoidably unsafe products, a phenomenon which is looming large in the field of drugs.

For reasons which may not convince an American lawyer, the notion of "danger" was rejected by the Committee of Experts. This applies to the definition "dangerous product" as well as to other formulas using the concept of "danger," *e.g.*, "the specific dangerous qualities of a product." The majority held that in the context of a product the word "dangerous" was equivocal and unsatisfactory because it would be difficult to decide what products were dangerous, some being dangerous by their very nature and others likely to become so only if defectively made. Experience reveals that serious damage is often caused by apparently harmless products that have become dangerous due to some miscarriage of the manufacturing process.²⁵ Thus, "an automobile is not an inherently dangerous vehicle," but, in *MacPherson v. Buick Motor Co.*,²⁶ Cardozo was certainly right in adding that this merely means "that danger is not to be expected when the vehicle is well constructed."²⁷ The rejection by the Committee of Experts of the notion of "danger" was

²³ RESTATEMENT (SECOND) OF TORTS § 402A (1964).

²⁴ RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 402A, comment *h* at 351 (1964).

²⁵ In the area of products liability it is helpful to distinguish between the following categories of cases: (1) products causing damage because of faulty design; (2) products which are defective because something went wrong during the manufacturing process; (3) products which are not defective as such but whose use may be unsafe unless proper instructions or warnings are given; and (4) products which are regarded as safe in terms of available knowledge when put into circulation, but which turn out to be harmful on the basis of subsequent scientific discovery. For details see Lorenz, *Länderbericht und rechtsvergleichende Betrachtung zur Haftung des Warenherstellers*, in *Die Haftung des Warenherstellers*, 28 ARBEITEN ZUR RECHTSVERGLEICHUNG 5 (1966); see also Kessler, *Products Liability*, 76 YALE L.J. 887, 938 (1967), which supplements this classification by adding a further group of cases, unavoidably unsafe products. However, it is arguable that these cases may be brought under category (3).

²⁶ 217 N.Y. 382, 111 N.E. 1050 (1916).

²⁷ *Id.* at 394, 111 N.E. at 1054.

perhaps prompted by a fear that subtle distinctions without a real difference might be drawn by the courts. It goes without saying that this would endanger the aim of harmonization of national laws.

After long and repeated discussion at several meetings, the term "defect" was made the heart of the Draft Convention's system of liability. The Committee formulated a negative definition taking as the basic elements "safety" and "legitimate expectancy." Hence, a product has a "defect" when it does not provide the safety which a person is entitled to expect, having regard to all the circumstances including the product's appearance. This definition makes clear that the notion of "defect" also covers those cases where the product as such is not defective, but where proper directions as to its use or warnings (*e.g.*, on the container) must be given in order to prevent damage to the consumer or user. This definition of "defect" does not say anything about the time at which the safety of a product must be determined. During the Committee debates, a suggestion was made that the safe nature of the product should be judged at the time the product was put into circulation and not at the time when the damage occurred. Because it might have implicitly resolved the crucial problem of "development risk," this proposal was rejected by the majority. The concern was that a court might rule out a "defect" in cases where the kind of risk involved was unforeseeable and unavoidable in the state of scientific knowledge at the time the product was put into circulation.²⁸

This notion of defect is the basis of the principal cause of action established by the Draft Convention: "The producer shall pay compensation for death or personal injuries caused by a defect in his product." At least in the opinion of the majority of the Committee of Experts, this means that one is entitled to protection against "development risks" as measured by standards of safety which, until the damage became apparent, were beyond human contemplation. It is by the way of an *ex post facto* rationalization that

²⁸ Some American courts have denied the liability of cigarette manufacturers in cases where the claimants could prove that a certain brand of cigarettes they had smoked for many years had caused lung cancer. In these cases, strict liability was denied on the ground that there was no foreseeability of that kind of risk; see *Lartigue v. R.J. Reynolds Tobacco Co.*, 317 F.2d 19 (5th Cir. 1963); *Ross v. Philip Morris & Co.*, 328 F.2d 3 (8th Cir. 1964). But see *Green v. American Tobacco Co.*, 391 F.2d 97 (5th Cir. 1968), wherein the action succeeded under Florida law. For details as to the complicated history of *Green*, which was eventually reversed by the circuit court sitting en banc (409 F.2d 1166 (5th Cir. 1969)), see W. PROSSER, *supra* note 5, § 99, at 660 n.82. Different considerations will apply in cases where the manufacturer, by way of advertising or sales literature, warrants that his products are not harmful; see *Cooper v. R.J. Reynolds Tobacco Co.*, 234 F.2d 170 (1st Cir. 1956); *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 392 (3d Cir. 1961).

a court may hold that the product has turned out to be defective. The modern legal policy of consumer protection may well encourage the expansion of liability to include risks which become known as a result of subsequent scientific discovery, but it is difficult to reconcile this view with a notion of defect which is phrased in terms of legitimate safety expectations. The utmost a consumer or user of a product may legitimately expect is that the product corresponds to the highest possible standard of the *lex artis* known at the time it is marketed. Moreover, he may expect a manufacturer to constantly observe his products after having put them into the stream of commerce. In other words, the manufacturer is under a duty of product observation (*Produktbeobachtungspflicht*). Creating higher expectations would be paramount to demanding the impossible. A legislator who wants to go beyond these natural limits should clearly say so. The mere omission of the time-element in the definition of "defect" is too subtle a device to establish beyond reasonable doubt that "development risks" are included. It is submitted, therefore, that the Draft Convention uses a notion of defect which does not adequately express the real intentions of its draftsmen, and it is by no means certain that different national courts will arrive at the same construction. Nor will it suffice to mention this point in the explanatory report of the Convention, because it is not the practice of courts in all countries to look into such materials describing a Convention's history.²⁹ If a proper formulation for the principle of liability as envisaged by the Strasbourg Convention on Products Liability were sought, it should simply read as follows: "The producer shall be liable for death or personal injuries caused by his product." Liability would thus be stated in absolute terms. Under the present text as interpreted by the draftsmen, the only expectation that counts is that one will not be injured by a product. This shows that the gist of the action is causation. Under such a system the manufacturer can avoid liability merely by proving one of the three classical exonerations which in French law, for instance, are recognized as *cause étrangère*, particularly in the area of Art. 1384 par. 1 of the *Code Civile: force majeure, faute de la victime* and *intervention d'un tiers*.³⁰

It is perhaps worth noting that the proposal to make an

²⁹ It is interesting to note that there was agreement that the "time" element may be relevant in certain situations which are covered by the definition of "defect." Thus, a person who in 1974 bought a refrigerator manufactured 20 years earlier which, unlike the 1974 models, did not possess certain safety devices, could not expect the degree of safety offered by a refrigerator manufactured in 1974.

³⁰ See 2 H., L. ET J. MAZEAUD, *RESPONSABILITÉ CIVILE*, §§ 1429-1665, at 524-780 (6th ed. 1970).

exception with respect to "development risks" met with the objection that it would make the Convention nugatory by reintroducing into its system of strict liability the possibility for the producer to prove the absence of fault on his part. Such fears were rooted in the fact that the element of foreseeability would come into play. Foreseeability is a negligence term which was deemed inappropriate for a Convention starting out with strict liability. This argument, however, is not entirely convincing. Strict liability based on the notion of "defect" is concerned with the allocation of risks which are typical for the activities of a certain enterprise: the entrepreneur is held liable for calculable risks which are reasonably insurable.³¹ Within the area of such risks it is certainly impermissible to argue that the defect which caused the harm has arisen from sources other than the negligence of the manufacturer (with the exception of the above-mentioned *cause étrangère*). Thus, the assembler of the final product could not escape liability by proving that there was negligence on the part of the manufacturer of a component and that it was impossible to discover this defect during the process of assembling. Such risks are clearly foreseeable, and under a system of strict liability the manufacturer of the final product is not allowed to show that he used all possible care to avoid the defect. True "development risks," on the other hand, are clearly distinguishable. They concern products which in the present state of human skill and scientific knowledge cannot be made entirely safe. Attention has been drawn in this context to penicillin and cortisone, two of the greatest medical discoveries in the history of mankind. Because such drugs may exhibit dangerous side effects despite having undergone long experimental stages, the question has been asked whether drug companies might have refrained from producing and selling.³²

It is arguable that an exoneration with respect to "development risks" fails to meet the demands of society in our age. If this type of risk is excluded from individual liability, how will a community help the victim in a situation which may be aggravated by the fact that a product has caused a large series of similar damages? It is fairly obvious that no civilized community could today ignore such a catastrophe and leave the victims without sufficient compensation. Unfortunately, the Committee of Experts, assisted in its deliberations by representatives of the European Insurance

³¹ For a general discussion of this problem, see A. EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* (1951), reprinted in 54 CALIF. L. REV. 1422 (1966).

³² See W. PROSSER, *supra* note 5, § 99, at 661.

Committee, has not convincingly determined the extent to which such risks are insurable.³³ In Germany, the Contergan cases—outside Germany known under the name of Thalidomide—have shown the social impact of this problem.³⁴ For these reasons the German Federal Government has recently submitted to the *Bundestag* a bill remodelling the law on pharmaceutical products.³⁵ Although the present system of liability of the individual manufacturer remains unchanged, the bill introduces absolute liability for the entire pharmaceutical industry. For this purpose a Pharmaceutical Products Indemnity Fund (*Arzneimittelentschädigungsfonds*) will be established.

The aim of the Pharmaceutical Products Indemnity Fund is to alleviate hardship in three types of cases where the victim of a pharmaceutical product presently receives little or no compensation: (1) the manufacturer is able to exonerate himself and thus is not liable under the present system; (2) the manufacturer, although liable, is unable to pay and is not sufficiently covered by insurance; and (3) the manufacturer's funds, required by law to cover personal injuries resulting from clinical testing, are nonexistent or inadequate. The Indemnity Fund, therefore, exercises a strictly subsidiary function. Its role is also subsidiary with respect to payments made by an insurer, by Social Security, or by the employer.³⁶ The amount of compensation is limited by a dual ceiling. In the event of death or personal injury to one person the maximum amount is DM 0.5 million capital (or DM 30,000 annuity). In the case of death or personal injury to several persons the total amount to be paid by the Fund is DM 200 millions capital

³³ At the beginning of its work the Committee of Experts was told that DM 50 millions was probably the maximum amount for which coverage was obtainable on the reinsurance market. As the work progressed, this figure was raised to DM 100 millions "and possibly more."

³⁴ See note 22 *supra*.

³⁵ See Regierungsentwurf eines Gesetzes zur Neuordnung des Arzneimittelrechts, July 17, 1974, issued by the Bundesministerium für Jugend, Familie, und Gesundheit.

³⁶ The Indemnity Fund is a nonprofit public institution which can be sued for compensation only under certain conditions: (1) the use of a pharmaceutical product must have caused a person's death or injured his body or health more than insignificantly (excluding any compensation for petty damages, damage to property, or economic loss); (2) the product must have been put into circulation in Germany; (3) the product, if properly used according to instructions, at the time of release must have shown harmful effects which exceed a level of tolerance considered acceptable by medical science, or the damage caused must have been due to instructions falling short of the actual knowledge of medical science. Contributions to the Fund are calculated according to the annual turnover multiplied by different risk factors relating to the substances contained in an individual production program. Their total, however, must not exceed 0.5% of the annual turnover achieved on the German market.

(or DM 12 millions annuity). If the total amount of damages suffered by several persons exceeds this maximum limit of compensation, the damages to be awarded to a single person will be reduced at a ratio corresponding to the proportion between the total amount of damages suffered and the maximum limit of damages to be awarded.

The decision of the Committee of Experts in favor of strict liability even in cases of "development risks" can be fully appreciated only if one considers the manner in which the Convention allocates the burden of proof with respect to causation of damage. It was initially decided that the producer should be liable unless he could prove that the defect which caused the damage did not exist at the time he put the product into circulation or that this defect came into being at a later date. After further discussion, however, this rigid formulation was modified to require only "that, having regard to the circumstances, it is probable" that the defect did not exist when the product was marketed or that the defect arose afterwards. The substance of this provision is not really affected by the change, because in this context "proving" means to convince a court that a given event has a certain cause, *e.g.*, that the defect arose afterwards as a result of a repair not carried out in a workmanlike manner. The same applies to the purely negative proof that the defect did not exist when the product was put into circulation. It goes without saying that such proof will often result in what is usually called a "weighing of probabilities," particularly if circumstantial evidence is presented. Nevertheless, the fact remains that the Draft Convention shifts the burden of proof with respect to causation.

The Convention's system of strict liability appears to extend beyond the present state of the law of products liability as it exists in the majority of American jurisdictions. A recent decision of the New York Court of Appeals, *Codling v. Paglia*,³⁷ may serve as an example for the proposition. It concerned a situation which is not uncommon in road accidents. On a clear, dry day a car, which had been bought only a few months earlier, suddenly drifted over the double solid line into the opposite lane of traffic and collided head on with an oncoming vehicle. The speed at the time of the accident was forty-five to fifty miles per hour. In the present context, only the evidentiary aspect of the action brought against the car manufacturer is of interest. The uncontradicted proof was that the automobile "went to the left," that the driver "tried to steer to the

³⁷ 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973).

right," but that he "couldn't steer right" for the car "wouldn't budge, she wouldn't give." Counsel for the manufacturer argued that no specific defect in the power steering was proven. Moreover, he claimed that even if a defect at the time of the accident was assumed, there was no proof that the defect existed when the automobile left the manufacturer's plant. The Court of Appeals approved the following instructions given to the jury by the trial court:

While the burden is upon the plaintiff to prove that the product was defective and that the defect existed while the product was in the manufacturer's possession, plaintiff is not required to prove the specific defect, especially where the product is complicated in nature. . . . Though the happening of the accident is not proof of a defective condition, a defect may be inferred from proof that the product did not perform as intended by the manufacturer.³⁸

As a matter of principle, therefore, the injured plaintiff must prove that the product was defective at the time it left the hands of the defendant manufacturer.³⁹ Although this proof is obviously not absolute or strict, in difficult situations it will be sufficient for a plaintiff to show by a preponderance of probability that the defect which caused the accident existed before its occurrence. In German law *prima facie* evidence may help a plaintiff.⁴⁰ In this context he may be required to disprove the possibility that the defect was caused by faulty repair work. This burden gains importance as time passes from the moment the defective product was put into circulation.

The Strasbourg Draft Convention obviously follows a different approach to the problem of burden of proof. In a case of the type decided by the New York Court of Appeals, the plaintiff need only show that he was injured by this particular product and that the accident occurred because the steering system was defective. In order to escape liability, the manufacturer must prove either that this specific defect did not exist when the car left his control or that it arose afterwards (*e.g.*, as a result of improper handling on the part of someone else). As a matter of justice, the burden of proof should be distributed according to the spheres of risk involved.

³⁸ *Id.* at 337, 298 N.E.2d at 625, 345 N.Y.S.2d at 465.

³⁹ This is also the view expressed in the RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 402A, comment *g* at 351 (1964); see also *Green v. Volkswagen of America, Inc.*, 485 F.2d 430 (6th Cir. 1973). For a general discussion of the proof required of a plaintiff seeking recovery for injuries from a defective product, see W. PROSSER, *supra* note 5, at 671-76.

⁴⁰ For details see Lorenz, *Beweisprobleme bei der Produzentenhaftung*, 170 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 367 (1970).

This means that the plaintiff should account for his own sphere: he must disprove possible causes of injury on his part.⁴¹ In so doing, circumstantial evidence and the rules of *prima facie* evidence as developed in the various legal systems will help in difficult situations. It will usually be sufficient to show a preponderance of probabilities. What is needed, therefore, is a flexible system which allows a court to weigh the different probabilities in order to discover the greater probability. The Draft Convention, by choosing the wrong starting point, does not permit a court to arrive at a balanced appreciation of evidence. Moreover, the danger of falsified claims is obvious.

As a result of this distribution of the burden of proof with respect to causation, the system of liability established by the Draft Convention is stricter than the law of products liability which prevails in the most progressive American jurisdictions. Both the inclusion in the Convention of "development risks" and the shifting of the burden of proof have so fundamentally changed the basis of liability that now it may fairly be called "absolute." It remains to be seen whether the more industrialized among the member states of the Council of Europe are prepared to go this far.⁴² For some countries the decision may very well be influenced by the position of the final text of the Convention with respect to limits upon recovery. This does not necessarily mean that the states ratifying the Convention should be completely free to set the maximum amount of compensation. If granted such discretion, a state might in an extreme case fix the amount so low as to reduce the weight of the Convention to nil. This danger could be avoided, however, by a solution of the type prevailing in certain conventions on international transport.⁴³ Contracting states could be permitted

⁴¹ See also the many actions against Coca-Cola Bottling Companies in which a plaintiff claimed to have been injured by some foreign substance contained in the bottle. It is interesting to note that courts may require a plaintiff to show that there was "no reasonable opportunity for tampering with the bottle or its contents, in the interim between the physical control of the bottler or manufacturer, and that of the consumer." *Coca-Cola Bottling Works v. Sullivan*, 178 Tenn. 405, 415, 158 S.W.2d 721, 725 (1942).

⁴² During the negotiations at Strasbourg, the present writer got the impression that some delegates had no precise instructions from their governments on certain important points. Thus, the votes which were taken (some of which were rather narrowly decided) do not necessarily permit conclusions as to the position which some countries will adopt at the time for signature and ratification.

⁴³ See, e.g., Art. 6 of the Additional Convention to the International Convention concerning the Carriage of Passengers and Luggage by Rail (CIV) of 25th February 1961 Relating to the Liability of the Railway for Death of, and Personal Injury to, Passengers (Berne 26 Feb. 1966) (English translation in 2 K. ZWIEGERT & J. KROPHOLLER, *SOURCES OF INTERNATIONAL UNIFORM LAW* 339, 340 (1972)).

to limit the amount of compensation on the condition that it was not less than a certain fixed sum. In this context it is necessary to distinguish between the death or personal injury to one person and the death or personal injury to several persons by a product of the same type. While it is relatively easy to agree on a high amount in the former instance, such agreement is not easily reached with respect to an overall limit which has practical significance for multiple claims arising, for instance, in the field of drugs.

III

PLACEMENT OF LIABILITY

Since it is not the purpose of this paper to deal exhaustively with the problems raised by the Strasbourg Draft Convention, only a few more points will be mentioned. They serve to indicate the difficulties presented by this attempt at international unification of substantive law on a European level.

The area of products liability is not easily defined because its outer limits are somewhat blurred. This is confirmed by the inconsistent terminology used in this field. In Germany, for example, the expressions *Produzentenhaftung* (producers' liability) and *Produk-tenhaftpflicht* (products liability) are used as if they were interchangeable terms. The same is true in France where the subject is called either *La responsabilité du vendeur-fabricant* or *La responsabilité du fait des produits*. It is well known that the modern law of products liability developed from duties that were placed upon sellers of food and drink.⁴⁴ This potential liability was quickly extended to those who produced or sold any sort of chattel capable of doing harm.⁴⁵ Strict products liability has now been extended even to a "mass-builder" of houses. In the New Jersey decision of *Schipper v. Levitt & Sons, Inc.*,⁴⁶ the child of the buyer had been injured by a

⁴⁴ See, e.g., *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 P. 633 (1913).

⁴⁵ See, e.g., *McAfee v. Cargill, Inc.*, 121 F. Supp. 5 (S.D. Cal. 1954) (extension of strict liability in case concerning animal food); see also *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, 353 Mich. 120, 90 N.W.2d 873 (1958), wherein the court found a warranty, without privity and without negligence, running from the manufacturer of cinder building blocks to the owner of cottages, which, as a result of a defect in the materials supplied, had started to crack.

⁴⁶ 44 N.J. 70, 207 A.2d 314 (1965). For a detailed discussion of this case, see Kessler, *Caveat Emptor und der Schutz des Hauskäufer's*, in 2 IUS PRIVATUM GENTIUM—FESTSCHRIFT FÜR MAX RHEINSTEIN 761, 771 (1969). Since then other jurisdictions have followed; see, e.g., *Kriegler v. Eichler Homes, Inc.*, 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969); *State Stove Manufacturing Co. v. Hodges*, 189 So. 2d 113 (Miss. 1966), cert. denied, 386 U.S. 912 (1967).

defective water heating apparatus. Because as used in the Draft Convention the expression "product" includes movables which have been "incorporated into immovables," the supplier of the chattel in *Levitt* would certainly be held strictly liable. However, in view of the fact that a number of countries retain a liability system specific to immovables, the builder would not be covered by the Convention. The Draft Convention, therefore, maintains a distinction between the "manufacturer" of an immovable in its entirety and the producer of a component part. In the opinion of some experts this restriction on the scope of the Convention did not go far enough. The suggestion was made to include only producers of such movables which "retain their functional autonomy." This would probably have meant that a boiler or an elevator would be within the scope of the Convention, whereas a steel girder would not. Courts in different countries, however, could hardly arrive at a uniform construction for such a vague proposal. Distinctions from the law of property⁴⁷ might then have determined who is responsible under the new régime of products liability. The liability of suppliers of chattels should not depend upon niceties of the law of property; the decision to reject such a proposal enhanced the overall clarity.

Another area of dispute in the Draft Convention arose with respect to natural products. To the extent that such goods have been processed they are indistinguishable from other industrial products, and their producers should be held equally liable under the Convention. It was doubtful, however, whether fishermen and growers of agricultural products should be held accountable to the same standards. For some countries this matter was particularly important. Even under the recent Hague Convention on the Law Applicable to Products Liability,⁴⁸ any contracting state may reserve the right not to apply the Convention to "raw agricultural products."⁴⁹ That the Hague Convention found this problem too controversial to handle illustrates how thorny a situation it created for unification of substantive law. The majority view, which favored the inclusion of natural products in the Strasbourg draft, nonetheless deserves support. It has become nearly impossible to draw a clear distinction between agricultural and industrial goods, especially since, under modern conditions, most agricultural prod-

⁴⁷ See, e.g., BGB §§ 93, 946 (Beck 1974).

⁴⁸ See note 6 and accompanying text *supra*.

⁴⁹ Hague Convention on the Law Applicable to Products Liability, art. 16, ¶ 1, No. 2, in *Conférence de La Haye, supra* note 6, at 249.

ucts are treated with one or more processes. These are often applied by the farmer himself, as for example with the spraying of insecticides and other chemicals. The case of a fisherman who unknowingly took his catch from mercury-polluted waters presents a somewhat different situation. One hesitates to classify him as a "producer"; he supplies a simple product with no adulterations. In contrast to the economic factors militating against "producer's" liability in this case, it seems more reasonable to hold responsible the processor of such natural products. He can exercise the necessary quality control and is in a better position to insure against the risks involved.

My final point is closely linked with another fundamental matter which required a decision at Strasbourg. A Convention which merely aims at unification of non-contractual conflict rules should, of course, have as broad a scope as possible. It should therefore address the liability of all persons in the commercial chain of preparation or distribution of a product. Indeed, the application of different conflict rules to manufacturers and other suppliers would unduly complicate the choice-of-law process.⁵⁰ For substantive law, however, different considerations are necessary. In this context, it must be borne in mind that the Draft Convention does not interfere with contractual liability under the applicable national law. Liability is established irrespective of contractual relations which may or may not exist between the victim and the person claimed to be liable.⁵¹

Compared with the present state of products liability in important American jurisdictions, the Draft Convention's approach to this problem is somewhat narrow. While the *Restatement (Second) of Torts* in section 402A imposes strict liability on any seller who "is engaged in the business of selling such a product," the Draft Convention does not go as far. It clearly establishes the liability of the manufacturer of a component part of an assembled product.⁵² However, the mere supplier of a product will be subject to strict

⁵⁰ See *id.* art. 3, at 247. Article 3 even applies to repairers and warehousemen.

⁵¹ See text accompanying note 1 *supra*.

⁵² The *Restatement (Second) of Torts* does not express an opinion on this point (RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 402A, caveat (3) at 348 (1964)); it appears that this must have been the result of two cases in which such liability was denied: *Montgomery v. Goodyear Tire & Rubber Co.*, 231 F. Supp. 447 (S.D.N.Y. 1964); *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963). This writer does not wish to express an opinion as to whether these decisions still represent the state of the American law of products liability with respect to manufacturers of component parts. But see W. PROSSER, *supra* note 5, at 664, who states that strict liability also applies to the maker of a component part.

liability under the Draft Convention only on certain conditions. If the product does not indicate the identity of the manufacturer, each supplier may be held liable unless within a reasonable time after a claimant's request the supplier discloses the identity of the producer or of the person who supplied him with the product. As a rule, therefore, wholesalers and retailers are not held strictly liable. However, the Committee of Experts was well aware that some sellers are currently causing their names or trademarks to appear on products which others have manufactured for them. Frequently the manufacturer of such a product is a small firm which may not be financially responsible. While there is little doubt that a seller "who puts out as his own product a chattel manufactured by another"⁵³ should be subject to the same liability as though he were a manufacturer, difficult questions of delimitation arise with respect to such intermediate persons who merely put their name or some other distinguishing feature on the product. Some European countries require sellers of certain products to do so by law. Sometimes it is merely done for advertising purposes, such as in the case of a car dealer who affixes his firm's tag to the cars he sells. Assuming it to be good policy not to hold every dealer responsible by the standards which apply to manufacturers, one is certainly not justified in treating wholesalers or retailers like manufacturers merely because their names appear somewhere on the product. The true distinction as to whether or not these intermediate persons may be analogized to producers would seem to be the criterion of "holding out" as a manufacturer, that is, a seller presents an item as his own product.

In spite of this principle against the inclusion of mere dealers, the Draft Convention made another exception intended to improve consumer protection. It gave special attention to situations where damage is caused by products imported from other countries. Even if the manufacturer were known, it would be burdensome for the victim to institute proceedings in a foreign country. For this reason the importer of a product is subject to the same liability which applies to the producer. The extent to which such a rule will really help a plaintiff remains to be seen, for it is well known that some firms in the import business are very small companies with little capital.

Leaving aside these exceptions, the decision of the Draft Convention not to impose strict liability upon dealers may be

⁵³ See RESTATEMENT (SECOND) OF TORTS § 400 (1965), which deals with the same fact situation.

justified on at least two grounds. First, the notion of enterprise liability, which is thought to be the true basis of this new type of strict responsibility for damage caused by a defective product, does not fit the situation of a dealer who is a mere conduit in the chain of commerce. In view of the complicated nature of many products, the possibility of intermediate inspection by the dealer is greatly reduced, and even where possible, such inspection would very often have to be executed in a way preventing the product's resale. It follows that strict liability of the mere dealer will have no appreciable "educational effect." The manufacturer, on the other hand, is in an entirely different position. One might argue that an airplane assembler does not possess any special knowledge when he installs complicated electronic equipment purchased from a manufacturer of such component parts. This oversimplifies the matter, however, because such assemblers have ample opportunity to test their products before putting them into circulation.⁵⁴ It is here that strict liability can serve as an incentive to raise the standards of quality control. Insurance is another important consideration that militates in favor of such "channelling of liability." Many dealers offer the public a large variety of products. Moreover, there are sometimes rapid changes in the kind of goods they sell. This means that the risks to be insured against are extremely difficult to calculate, and there is always the danger that insurance coverage will not be sufficient. But even if the insurance taken out is commensurate with the risks involved, the question remains whether it is reasonable to add the premiums paid by dealers to the cost of the products.

A civil lawyer looking at the American law of products liability is inclined to raise a final critical question. Should a system encourage litigation which starts with the weakest link in the chain of successive sales and which, only through the device of third party procedure, brings in the wholesaler, the assembler, and the manufacturer of the defective component part which caused the damage? This sort of circuitous litigation may well have an historical explanation. It must be remembered that this new type of strict products liability has developed from the seller's warranty against defects of quality. During the last century, warranty actions were regarded as contractual remedies. As such, they have been incorporated into the English Sale of Goods Act and in other similar codifications of the common law system. Because under this prem-

⁵⁴ Cf. *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

ise privity of contract must be respected, it makes sense to roll back the chain of successive sales. However, strict products liability, even though it may sometimes be expressed in terms of "warranty," is a very different kind of warranty from those usually found in the context of a sale of goods.⁵⁵ Once this is recognized, there is no compelling reason to follow a procedure developed in the area of contracts.

⁵⁵ See RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 402A, comment *m* at 355 (1964).

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